Damages

1. ‘Difference’ theory

Damages should correspond to the difference between the economic position in which the aggrieved party finds himself as a result of a breach (infringement) and the economic position in which the party would have been absent the breach (infringement).

2. ‘Performance’ measure v. Reliance measure

- The amount of damage aims to put the aggrieved party, as far as practicable, in a position where he would have been in if the contract had been duly performed (‘performance’ measure).
- 91Da33070 (conveyance effected by forged documents); cf. tort measure of damage
- Where contract is terminated on the ground of the other party’s breach, performance measure of damage is normally claimable. But the plaintiff may instead elect to claim reliance measure of damage (□□□□□ □□□□ □□ □□ □□ □ “□□□□” □□□ □□□□ □□ □□). □□□ 2002. 6. 11 □□ 2002□2539 □ □, □□□ 2003. 10. 23 □□ 2001□75295 □□ (The costs incurred in reliance of the contract are claimable. The costs which are usually incurred for the purpose of concluding the contract and readying oneself for the performance of the contract are claimable regardless of whether the other party knew about such costs. Any costs over and above the usual costs are claimable only to the extent foreseeable by the other party. However, the amount claimable under the reliance measure of damage may not be more than the performance measure of damage.)

3. Damages must be real and measurable

- Hypothetical possibilities not to be compensated.
- Reasonable degree of certainty is enough: 2001Da22833
- However, difficulty of assessment is no bar to an award of damages
- 2000Da5817, 2004Da48508 (The court may determine the quantum “on the basis of the totality of all relevant facts emerged from the proofs and pleadings”)
- Chaplin v. Hicks [1911] 2 K.B. 786 (a candidate in a beauty competition was, in breach of contract, not allowed to compete in a later stage of the competition)

4. Loss which must be compensated

- causation: deals with “what loss” must be compensated
- ordinary loss/special loss: deals with “how much” of the loss must be compensated
- ordinary loss, Art 393(1):
    - the loss which would obviously arise in the ordinary course of things viewed from an objective standpoint.
    - the defendant may not plead that the loss was not foreseeable for him (for it was objectively foreseeable)
    - 2004Gahap9444 (dairy cow meat)
    - 95Da11344 (a lorry hitting an electricity pole, causing the power cut which lasted for more than 12 hours. Farmers sustained loss from the frosting of flowers which were being grown in the nearby green houses. Held, the loss was not foreseeable.)
    - damnum emergens + lucrum cessans
    - Art. 51(2) of Sale of Goods Act 1979 of UK (Damages for non-delivery) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract.
    - Art. 53(2) of Sale of Goods Act 1979 of UK

(Damages for breach of warranty) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

- special loss, Art 393(2):
  - the loss which occurred because of the special circumstances
  - Special loss needs to be compensated only when it was foreseeable (at the time of the contract (Art 74 of CISG)? or at the time of the breach?)
  - 84Daka1532 (Daewoo)
  - 91Da29972 (cotton T-shirts)
  - Art. 54(1) of Sale of Goods Act 1979 of UK: Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

5. 'Reference date' for damage assessment

- General principle: at the close of hearing (□□□□ □□) □□□ 1115□.
- However, special rules apply:
  - Buyer's loss in the event of repudiation/impossibility of the seller's performance: loss assessed at the time of the breach. Subsequent increase of the market price can only be a "special loss" (claimable only when foreseeable by the seller), subsequent decrease of the market value is irrelevant (because it is not

the buyer's property, therefore buyer has no reason to bear the loss from the downward fluctuation) 94Da61359, 2005Da63337

- Where the buyer claims damages in lieu of performance against the seller who is in delay, the damage calculation must be done as of the time when the seller fails to comply with the buyer's demand for performance within a reasonably extended deadline. This is the moment when the buyer definitively gives up the claim for the performance and seeks damages in lieu of performance. 66Da1842

- Seller's loss in the event of buyer's repudiation:
  - If the seller terminated the contract and subsequently sold the thing to a third party at a lower price (assuming that it is not 'unusually low'): the difference between the two prices plus interest between the original due date and the date on which the lower price was received (2004Da3543).
  - If the seller terminated the contract but did not sell the thing: the difference between the contract price and the market value of the thing at the close of hearing (because that is the "economic benefit which remains with the seller in the case of termination").
  - If the seller terminated and subsequently sold the thing at a higher price than the economic benefit the seller would have obtained if the original contract had been properly performed on time by both parties (contract price+interest from the original due date), then no loss. Hence no damage.
  - If the seller terminated and chose to retain the thing: the difference between the "economic benefit the seller would have obtained if the

original contract had been properly performed" (original contract price plus interest from the original due date) and the market value of the thing at the close of hearing. If the price drop in the meantime was unforeseeable by the buyer, seller may not claim. The seller may not disregard the appreciation of the market value in the meantime (whether foreseen or unforeseen by the buyer). Benefit does not need to be foreseeable. It is only the loss which needs to be foreseeable if the compensation is to be ordered.

- If the seller does not terminate the contract in spite of the buyer's repudiation, then the seller shall be entitled only to a delay damage (if the thing sold was already delivered) plus specific performance. Seller cannot normally claim delay interest on the purchase price if the seller does not surrender possession of the thing sold and enjoys the possession of the thing sold.

6. Liquidated damages, Art. 398(1)

- Agreement as to the amount of loss, in advance of a breach
- Actual amount of loss is irrelevant. No need to prove, nor is it possible to disprove the amount of loss.
- Excessive amount of liquidated damages would justify court's intervention
- The court can, even if the party does not claim a reduction, reduce the amount of damage. □□□ 2009. 2. 26 □□ 2007□19051 □□
- Penalty v. liquidated damages
- In common law, penalty clause is invalid

7. Comparative negligence, duty to mitigate

comparative negligence: Articles 396, 763

‘duty to mitigate’ 2003Da22912

신의칙 또는 손해부담의 공평이라는 손해배상제도의 이념에 비추어 볼 때, 불법행위의 피해자에게는 그로 인한 손해의 확대를 방지하거나 감경하기 위하여 노력하여야 할 일반적인 의무가 있으며 피해자가 합리적인 이유 없이 손해경감조치 의무를 이행하지 않을 경우에는 법원이 그 손해배상액을 정함에 있어 민법 제763조, 제396조를 유추적용하여 그 손해확대에 기여한 피해자의 의무불이행의 점을 참작할 수 있고, 한편 손해의 확대를 방지하거나 경감하는데 적절한 법적 조치가 존재하는 경우 이는 손해경감조치에 해당될 수 있고, 피해자가 그 법적 조치를 취함에 있어 감당하기 어려운 많은 비용이 소요된다든가, 그 결과가 불확실하다거나, 판단을 받기까지 현저하게 많은 시간이 필요하다는 등 의 사정이 없음에도 불구하고 합리적인 이유 없이 그 법적 조치를 취하지 아니한 경우에는 그 손해확대에 기여한 피 해자의 의무불이행의 점을 손해배상액을 정함에 있어 참작할 수 있다.

Keechang Kim, “Measure of Damages under Korean Contract Law“, 2 Asian Business Lawyer (2008)

Damage v Cost or expenses: 99Da9646

Art 74, CISG

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

FIDIC Standard Conditions of Contract (for Construction, EPC/Turnkey Projects, Plant and Design Build) template clause:

Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract…

Croudace Construction Ltd v Cawoods Concrete Products Ltd [1978] 2 Lloyd’s Rep. 55 at 62. (‘consequential’ does not

cover any loss which directly and naturally results in the ordinary course of events from late delivery)

Ferryways NV v Associated British Ports [2008] 1 C.L.C. 117 at 138

Koufos v C. Czarnikow Ltd. [1969] 1 A.C. 350 at 385 (Sugar price falling, delivery of sugar delayed for 9 or 10 days. Loss of profit must be compensated. Forseeable loss = directly and naturally caused loss?): “The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract […]”

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